

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRUCE D. THURMAN
Claimant

VS.

DOWNEY FOUNDATION, INC.
Respondent

AND

MARYLAND CASUALTY COMPANY
Insurance Carrier

AND

WORKERS COMPENSATION FUND

Docket No. 168,213

ORDER

All parties request review of the Award of Administrative Law Judge Robert H. Foreschler entered in this proceeding on May 5, 1994.

APPEARANCES

Claimant appeared by his attorney, Daniel L. Smith of Overland Park, Kansas. The respondent and its insurance carrier appeared by their attorney, J. Donald Lysaught, Jr. of Kansas City, Kansas. The Workers Compensation Fund appeared by its attorney, Bruce D. Mayfield of Overland Park, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a fifteen percent (15%) functional impairment rating to the body. The claimant requested review and contends he was entitled to benefits based upon a work disability. The respondent, insurance carrier, and Workers Compensation Fund all requested review and contend claimant is entitled to benefits for scheduled injury only. The sole issue now before the Appeals Board is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be modified. Claimant should be entitled psychological treatment and temporary total disability benefits from December 31, 1992, until further order of the Director.

Claimant injured his left arm and shoulder on May 6, 1992, when he slipped while climbing to the top of a concrete wall and fell, catching his left arm on a "pouring board" and hanging there. The claimant was treated at the Oak Park Mall Emergency Center where he was referred to James Lipsey, M.D., who kept him off work for one week. Dr. Lipsey released claimant to return to work on May 13, 1992, with his left arm in a splint and brace. Claimant was restricted to using his right arm only. After his initial return, claimant worked until May 28, 1992, when he was again taken off work. Claimant then returned to work in July 1992 and began developing tendinitis in his right elbow. In August 1992, claimant was again taken off work and remained off this time until December. During this period, claimant began seeing Vito J. Carabetta, M.D., a physical medicine and rehabilitation specialist, for treatment. Although there is a dispute regarding the number of days accommodated work existed for claimant during the month of December, claimant did work several days with his last day of work being on or about December 30, 1992.

The respondent presented the testimony of Dr. Carabetta, who first saw claimant on September 22, 1992. Over a four (4) month period, Dr. Carabetta saw claimant five (5) times, with his last visit occurring on November 4, 1992. Dr. Carabetta believes claimant sustained a partial tear of the left biceps muscle as a result of his accidental injury and now has a five percent (5%) permanent partial impairment of function to the left upper extremity. Although the doctor believes claimant also sustained a compensatory injury to the right arm as a result of the original biceps injury, he felt the right arm injury would resolve and, therefore, provided a functional impairment rating of the left arm only.

At the request of his attorney, claimant was examined by orthopedic surgeon Edward J. Prostic, M.D., on March 15, 1993. Dr. Prostic also believes claimant ruptured

his left biceps muscle as a result of the May 1992 accident, but also thinks claimant has rotator cuff tendinitis in the left shoulder either as a direct result of the trauma of the accident or that it developed from abnormal body mechanics following the incident. He also believes claimant has developed tendinitis in the right elbow as a result of overusing the right arm during rehabilitation of the left. According to Dr. Prostic, claimant has sustained a permanent functional impairment of ten percent (10%) to the right upper extremity and twelve percent (12%) to the left upper extremity and shoulder, which combines to a fifteen percent (15%) permanent partial impairment of function to the body as a whole.

Claimant presented the testimony of psychologist Stanley Butts, Ph.D. After interviewing and testing claimant, Dr. Butts diagnosed claimant as having major depression that developed as a direct result of claimant's work-related injury. The doctor testified the depression was a clinical disorder rather than a personality disorder. As a result of the combined physical and psychological components of his injury, Dr. Butts believes claimant is presently unable to work and requires psychotherapy.

When a worker sustains physical injury in a compensable work-related accident, the worker is entitled to workers compensation benefits for psychological disorders that are directly traceable to and develop as a result of the physical injury. See Love v. McDonald's Restaurant, 13 Kan. App. 2d 397, 771 P.2d 557 (1989), and Berger v. Hahner, Foreman & Cale, Inc., 211 Kan. 541, 506 P.2d 1175 (1973).

The Appeals Board finds the testimony of Dr. Butts regarding claimant's psychological disorder and its effect upon his present ability to work is uncontroverted.

"Uncontroverted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive." Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146, syl. ¶ 2 (1976); Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036, syl. ¶ 5 (1978).

Although respondent argues Dr. Butts' opinions should be disregarded in their entirety because the doctor lacked certain information, respondent's argument goes to the weight the evidence should be given. The Appeals Board finds Dr. Butts' opinions should not be disregarded. Because the evidence concerning claimant's psychological disorder and effect upon his present ability to work is uncontradicted and uncontroverted, it should be regarded as conclusive. See Anderson v. Kinsley, *supra*. Based upon the testimony of Dr. Butts, the Appeals Board finds claimant is presently temporarily and totally disabled from engaging in any substantial or gainful employment and entitled to receive psychological treatment and temporary total disability benefits under K.S.A 44-510c from December 31, 1992, until further order of the Director. At such time as claimant's condition plateaus or becomes permanent in nature, the parties may apply for review and modification of this Award for a determination of permanent partial general disability, if any.

Pursuant to the stipulations of the parties, the Workers Compensation Fund is responsible for one-third of both the cost of the psychological treatment and temporary total disability benefits to be provided to claimant as ordered herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler, dated May 5, 1994, should be, and hereby is, modified as follows:

The award of benefits for a 15% permanent partial general disability is set aside. Because the evidence indicates claimant was temporarily and totally disabled and in need of treatment for the psychological disorder as of the date the proceeding was submitted to the Administrative Law Judge for decision and because we do not know what has transpired since the Regular Hearing, the case is remanded to the Administrative Law Judge for further proceedings consistent with this Order.

The remaining orders of the Administrative Law Judge that are not inconsistent with the orders set forth above are hereby adopted by the Appeals Board for this review.

IT IS SO ORDERED.

Dated this ____ day of June, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Daniel L. Smith, Overland Park, Kansas
J. Donald Lysaught, Jr., Kansas City, Kansas
Bruce D. Mayfield, Overland Park, Kansas
Robert H. Foerschler, Administrative Law Judge
George Gomez, Director